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No. 95-433

In The

Supreme Court of the United States

October Term, 1995

LAURANCE B. WOLFBERG AND
CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In this response, Robert I. Greenberg will be referred to as "Greenberg" and Laurance Wolfberg will be referred to as "Wolfberg." Laurance and Carolyn Wolfberg will be referred to collectively as "the Wolfbergs."

STATEMENT OF THE CASE

This appeal is from a jury verdict in favor of Robert I. Greenberg on his cause of action against the Wolfbergs for malicious prosecution and abuse of process, based upon claims brought against him serially and contemporaneously in five lawsuits beginning in 1986 and continuing into 1990. The Wolfbergs sought punitive damages against Greenberg for millions of dollars, seeking over ten million dollars in punitive damages in one lawsuit alone. Their avowed intent was to break Robert I. Greenberg financially and emotionally. They lost their claims for damages in toto.

Greenberg's case against the Wolfbergs was filed in the United States District Court for the Western District of Oklahoma. At trial, the jury found in response to special interrogatories that each of the five predicate lawsuits was brought with malice and without probable cause and constituted both malicious prosecution and abuse of process. Greenberg was awarded actual damage jointly against the Wolfbergs in the amount of $284,000, and punitive damages in the amount of $1,750,000 against

Laurance Wolfberg and $500,000 against Carolyn Wolfberg. On appeal, the Tenth Circuit Court of Appeals reviewed the proceedings in the trial court and in conjunction with that review certified questions to the Oklahoma Supreme Court concerning the propriety of combining the predicate litigation into a single action. Petition at 29a. Following the response by the Oklahoma Supreme Court to that inquiry, the Tenth Circuit Court of Appeals affirmed the judgment of the trial court. Petition at 1a. The Wolfbergs now petition this court for certiorari asserting the punitive damage verdict against them is unconstitutionally large.

STATEMENT OF FACTS

Although the Wolfbergs seek to trivialize the series of lawsuits which form the predicate for this action as a mere "family feud", Laurance Wolfberg's directive to his attorneys discloses his intent to remove Greenberg from his position of influence within the family, destroy him emotionally and financially, and "bring him to his knees" through multi-million dollar judgments. App. 30a. As part of an "overall legal strategy", App. 32a, the Wolfbergs sought to force Greenberg's resignation as trustee of his father's testamentary trust, avoid payments of their company's promissory note to the trust and acquire property owned by the trust at a fire-sale price. Alternatively, the Wolfbergs sought to dissolve the trust entirely. A synopsis of the personal and business relations between the parties, as well as an accurate portrayal of the Wolfbergs' motives and actions in bringing the five predicate lawsuits, is necessary for this court to appreciate the

malice which the jury saw in the Wolfbergs, and for which the punitive damages were assessed.

A. THE PARTIES

Carolyn Wolfberg and Robert Greenberg are the children of Mal and Rose Greenberg. Laurance Wolfberg is the husband of Carolyn Wolfberg. For a number of years Robert Greenberg and Laurance Wolfberg shared their business operations on an equal basis, including the operation of Service Business Forms, a company founded by Mal Greenberg; Griffith Resources, an oil field service company; and Green Wolf Oil Company, an oil and gas partnership. By his will, Mal Greenberg established a testamentary trust which would devolve to his children upon the death of their mother, with Robert Greenberg to receive his share outright and Carolyn Wolfberg's share to be held in trust. By the terms of Mal Greenberg's will, she is to be periodically paid interest on the principal which remains in trust for her benefit and which will be distributed upon her death. Robert Greenberg was designated as a trustee of both the Mal Greenberg Testamentary Trust and the trust for Carolyn Wolfberg's benefit.

In October, 1982, Greenberg and Wolfberg agreed to separate their business interests. In the division, the Wolfbergs acquired Service Business Forms ("Service"). Wolfberg wanted all of the outstanding stock in Service, some of which was owned by the Mal Greenberg Testamentary Trust. A price was negotiated for the Trust stock whereby Service executed a note in favor of the Trust for $100,000. Around that same time period, Griffith Resources, which

Greenberg and Wolfberg owned with a cousin, was faced with a post-oil-boom-recession $1,000,000 cash call from the bank which had loaned them the capital for its formation. At Wolfberg's suggestion, the family shared the bank's demands pro-rata, with the share of Greenberg and Wolfberg paid through a loan to Griffith by Green Wolf Oil Company, their oil and gas partnership.[1]

In October, 1986, Service defaulted on the note and was put on notice of acceleration of the terms of payment. Because Wolfberg anticipated the Trust would eventually sue Service to collect on its note, he and his wife elected to strike first. They filed three of the predicate groundless lawsuits which form the basis of this case within a 30 day time period, charging Robert Greenberg with fraud, conversion and breach of fiduciary duty, seeking over $10,000,000 in punitive damages against Greenberg personally, removal of the Trustees, and relief from payment of the Service note.

B. THE PREDICATE LAWSUITS

Case #1

Based on alleged wrongdoing in winding down the Green Wolf partnership, Predicate Case #1 was filed November 3, 1986 in the United States District Court for

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[1] During this same time period, the Green Wolf partnership was dissolved. Although Greenberg asked Wolfberg for suggestions for winding down the affairs of the partnership, he received none. He was left no choice but to shoulder that responsibility himself.

the Western District of Oklahoma, styled *Laurance Wolfberg v. Robert I. Greenberg*, Case No. CIV-86-2441-C. The first claim sought an accounting and one-half of partnership profits realized from alleged wrongful use of Wolfberg assets; the second claim alleged Greenberg fraudulently breached fiduciary duties by borrowing money and converting partnership assets. As relief, Wolfberg sought to have Greenberg declared completely liable for the $400,000 loan to Griffith Resources, and prayed for $1,000,000 in punitive damages.

Although an accounting was granted, it revealed no wrongdoing on Greenberg's part, and Wolfberg did not prevail on any of his damage claims.[2] In so ruling, Magistrate Robin Cauthron made an express finding that Wolfberg's testimony on one point was so incredible that it tainted his credibility on every other issue. App. 6a. After the Tenth Circuit Court of Appeals affirmed, Wolfberg directed his lawyers to petition for certiorari as part of his "overall legal strategy." App. 32a. The Wolfbergs sought to force removal of Greenberg as trustee pending certiorari so that their overall purpose might yet be accomplished. The writ was denied November 13, 1989.

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[2] A claim that Greenberg had fraudulently borrowed money in partnership name and converted it to his own use was abandoned by his lawyers in their final contentions, despite the fact that Wolfberg had admittedly known for nearly ten months that this claim was groundless.

Case #2

With the awareness that the Trust would likely file suit to collect on the note, Predicate Case #2 was filed November 26, 1986 in the District Court of Oklahoma County, Oklahoma, styled *Service Business Forms, Service Computer Forms, Laurance Wolfberg and Carolyn Wolfberg v. Robert I. Greenberg, Trustee, Maynard Greenberg, Trustee, Rose Greenberg, Trustee, and Robert I. Greenberg, Individually,* Case No. CJ-86-12606. This lawsuit sought damages in the amount of $300,000 for breach of contract and fraud, and $1,000,000 punitive damages against Greenberg.

Based on a purported promise by Greenberg to disclaim proceeds on the note, this lawsuit was admittedly filed in an attempt to force Greenberg, on behalf of the Trust, to file a "mandatory" counterclaim on the note in this state court action. However, the Trust filed a separate federal action (Case #5) in which the same alleged disclaimer became the basis for the Wolfbergs' counterclaim against Greenberg in that case. An advisory jury empaneled in Case #5 specifically found that no agreement to make a disclaimer had been made by Greenberg. The Wolfbergs were forced by operation of preclusion to dismiss their claims in Case #2 or fall to a motion for summary judgment.

Case #3

On December 3, 1986, Predicate Case #3 styled *Carolyn Wolfberg v. Robert I. Greenberg, Trustee, Maynard Greenberg, Trustee, Rose Greenberg, Trustee and Robert I.*

Greenberg, individually, Case No. CJ-86-12734 was filed in the District Court of Oklahoma County, Oklahoma, seeking an accounting, removal of trustees, dissolution of the trust and distribution of property. The lawsuit alleged breach of fiduciary duties, and sought punitive damages in excess of $10,000,000 against Robert Greenberg in his individual capacity. The trial court allowed an audit of the trust's records by the Wolfbergs' accountants. Unable to find evidence of misconduct on the part of any of the trustees and faced with a hearing on a motion for summary judgment on September 18, 1987, the action was dismissed without prejudice September 17, 1987.[3] Because the Wolfbergs believed Greenberg had a "hometown advantage" and believed the judge was not favorable, the claim was sent to Wolfberg's Kansas lawyers for refiling and became Case #4. App. 20a.

Case #4

Filed on September 16, 1988 (one day before it would have been barred by the statute of limitations) in the District Court of Sedgwick County, Kansas, this revival of Case #3, styled *Carolyn Greenberg Wolfberg, Beneficiary Under the Mal Greenberg Testamentary Trust v. Robert I Greenberg, Maynard Greenberg, and Rose Greenberg, Co-Trustees Under the Mal Greenberg Testamentary Trust, Robert*

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[3] In his denial of the Wolfbergs' post-trial motions, Judge Alley specifically noted that Case #3 was "particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis." Petition at 25a.

I. Greenberg, Beneficiary Under the Mal Greenberg Testamentary Trust; and Rose Greenberg, Beneficiary Under the Mal Greenberg Testamentary Trust, sought to remove the trustees of Carolyn's father's testamentary trust on the basis of alleged hostility toward her.

Although the only relief sought was removal of the trustees, the motivating force, as in Case #3, was the hope of replacing existing trustees with new trustees who would be willing to forgive or discount the Trust's judgment on the note against Service Business Forms (obtained by the Trust in Case #5) and agree to relieve Carolyn's anticipated share of her father's estate from restrictions imposed by the trust. Wolfberg also sought to use this litigation as part of a business strategy to force the sale of a building known as the "Meade Avenue Building," owned by the Trust, at a discount price.

Ruling on the issue of hostility by the trustees as alleged by Carolyn Wolfberg, the trial court specifically found no hostility by the trustees toward Mrs. Wolfberg. To the contrary, the Court declared that any hostility which might exist was hostility by Laurance Wolfberg toward Greenberg. App. 17a.

Case #5

Predicate Case #5 was initially brought as an action by the trustees of the Mal Greenberg Testamentary Trust against Service Business Forms. The trust sought to enforce payment of the note which Service had executed in payment for the purchase of its remaining stock when

acquired by the Wolfbergs in 1982. Styled *Robert I. Greenberg, et al. v. Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc.*, this lawsuit became the fifth predicate action when the Wolfbergs caused a counterclaim to be filed against Robert Greenberg alleging as in Case #2 that Greenberg had fraudulently agreed to disclaim his share of his father's estate and to execute a disclaimer as to all of his mother's jewelry.[4] The counterclaim sought to compel Greenberg to execute the disclaimers. Partial summary judgment was granted to the trustees on the note, and the jury found for Greenberg on the counterclaim. The Court of Appeals for the Tenth Circuit affirmed, and this Court denied certiorari in January, 1990.

THE PROCEEDINGS BELOW

I. THE ACTUAL DAMAGES AWARDED AT TRIAL

Petitioners' lawyers attempt to give the impression that Greenberg only sustained $34,000 in "out-of-pocket" damages for legal fees throughout this succession of cases. This overlooks the fact that Greenberg had recovered his attorneys' fees and expenses by court order in predicate Case #5 and that the Mal Greenberg Trust paid additional litigation fees. Although Greenberg's share of

[4] Although the Wolfbergs' Petition for Certiorari states "[n]either Mr. Wolfberg nor Mrs. Wolfberg was a party to this case" (Petition at p. 4), no court which has reviewed these facts has had any difficulty finding that the counterclaim was caused to be brought by the Wolfbergs, and was directed at Robert Greenberg.

the trust was thus diminished, he did not seek to recover that loss. More importantly, the jury heard evidence of the emotional distress, anxiety and fear exacted upon Greenberg by the succession of lawsuits which sought millions in punitive damages from him. Petition at 54a. If the Wolfbergs had prevailed on any of their claims, the results would have been devastating to Greenberg. In addition, the jury heard evidence of a lost business opportunity worth $250,000 in which Greenberg was unable to participate because of the overwhelming effect of the litigation on his psyche and his consequent inability to focus on his business. Petition at 56a-57a.

The argument that Greenberg's damages were limited to his out-of-pocket loss is nothing more than legal gamesmanship and is out of place in proceedings before this Court. The Court should note arguments characterizing the Wolfbergs' conduct as a mere family feud and Greenberg's damages as $34,000 out-of-pocket expense are made by lawyers who were not involved in any of the serial predicate litigation, trial of the subject case in the United States District Court for the Western District of Oklahoma, the appeal to the United States Court of Appeals for the Tenth Circuit or the questions certified to the Oklahoma Supreme Court.

II. THE PUNITIVE DAMAGE AWARD

At the close of evidence, pursuant to the procedure dictated by Oklahoma's punitive damage statute, 23 Okla.Stat.tit. § 9, Judge Alley specifically found the jury had been presented evidence sufficient to justify an instruction on punitive damages, App. 22a, and further

found ample evidence to justify lifting the cap on punitive damages. As Judge Alley explained:

> The jury has been presented clear and convincing evidence that the lawsuits were oppressive. They could conclude that false testimony was given in those cases which would constitute a species of fraud. And they have a great deal of evidence, as is even conceded by Mr. Barnes in his brief, that what activated these lawsuits was malice.

App. 22a. In his Order denying Petitioners' Motion for Judgment Notwithstanding the Verdict, For Certification To The Oklahoma Supreme Court, Motion For New Trial Or For Remittitur Of Damages, Judge Alley again had occasion to address the sufficiency of evidence to support the punitive damage award and, as Petitioners concede, he found nothing about the award objectionable considering the evidence of the Defendants' net worth. Petition at 27a.

The evidence of the Wolfbergs' net worth was from a financial statement prepared by the Wolfbergs which showed the Wolfbergs had a net worth of over $23,000,000 in 1987 (during which time four of the five lawsuits against Greenberg were pending). App. 23a. In addition, Laurance Wolfberg testified that after 1987, the Wolfbergs had sold real estate for $22,000,000 which they had valued in their financial statement as being worth $13,000,000. App. 25a. Wolfberg also testified that as of 1990, his pre-tax income was over $1,000,000 per year. App. 26a.

Although they had the opportunity to controvert this evidence at trial, the accuracy of their own statements

was unchallenged.[5] Judge Alley correctly found the punitive damage award appropriate.

The Court of Appeals for the Tenth Circuit likewise found nothing objectionable about the actual and punitive damage awards, despite the fact that Petitioners raised both the issue of disproportionality and the supposed unconstitutionality of Oklahoma's punitive damage statute. Contrary to Petitioners' suggestions in their brief, the Tenth Circuit squarely addressed both issues, and found the damage award supported by both the law and evidence.[6]

In sum, the damages awarded by the jury were based upon abundant evidence of the Wolfberg's malice toward Greenberg, obvious evidence of their repetitively litigious behavior, and clear evidence of their wealth. The jury awarded what damage they felt was appropriate based upon this evidence, and no court which has reviewed that evidence has disagreed.

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[5] In their Petition, the Wolfbergs now attempt to offer an alternate figure for their net worth. Petition at 13. This evidence was never offered at trial.

[6] Nor did the Tenth Circuit take issue with Greenberg's tort causes of action. The Tenth Circuit did acknowledge that Oklahoma did not have precedent regarding successive civil proceedings. The Court of Appeals certified four specific questions to the Oklahoma Supreme Court regarding this issue. In response to those questions, the Oklahoma Supreme Court clearly indicated that such a theory was recognized in Oklahoma. Petition at 29a. In writing its opinion based upon this guidance, the Court of Appeals held that Greenberg had indeed made his case under Oklahoma law. Petition at 1a.

REASONS FOR DENYING THE WRIT

1. THIS CASE BEARS NO RESEMBLANCE TO *BMW*.

Having failed to convince the jury, the trial court and the Tenth Circuit that they did not file the five lawsuits with malice and without probable cause, the Wolfbergs now seek to avoid the jury verdict on the basis that "issues here are substantially similar to those presented in *BMW of North America, Inc. v. Gore*, 644 So.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995) (No. 94-896)." In making this argument, Petitioners cite to *Pacific Mutual Life Ins. Co. v. Haslip* 499 U.S. 1 (1991), *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), and the Petition for Certiorari in *BMW*. However, none of these cases support the argument that the jury verdict is flawed. If anything, a comparison of these cases with the evidence presented by Greenberg makes it clear the jury was correct in its decision.

First, the Tenth Circuit opinion holds that the Wolfbergs do not have any basis for further review based on due process, despite the fact that their counsel made due process arguments based on *Haslip* both in their appeal briefs and at oral argument. The Court of Appeals squarely addressed that issue and declared:

> The award of punitive damages is challenged as excessive considering the defendants' net worth. We do not find in the record a basis for this argument of defendants. The Oklahoma statute does not violate due process as the Appellants urge. We have considered the statute or a similar statute in prior cases. *See John A. Henry & Co.*

Ltd. v. T.G.&Y. Stores Co., 941 F.2d 1068 (10th Cir.), and *Silkwood v. Kerr-McGee*, 769 F.2d 1451 (10th Cir.).

Petition at 17a. Therefore, not only did the Tenth Circuit declare that Oklahoma's statute satisfies due process, but it reiterated that the Wolfbergs themselves were indeed afforded due process based on the record in this case. In fact, the trial court was required to and did make an evaluation of the Wolfbergs' "wrong" prior to instructing on the issue. App. 22a. Thereafter, he reviewed the award in response to the Wolfbergs' post-trial motions. Petition at 27a.

The *Honda* decision does not suggest any basis for review of this case. In *Honda*, this court declared unconstitutional an Oregon statute which specifically prohibited judicial review of punitive damages awarded by a jury. 114 S.Ct. 2331 at 2342. In so doing, this court pointed out that "every other State in the Union affords post-verdict judicial review of the amount of a punitive damages award." *Id.* at 2338. Such is the case with Oklahoma's punitive damages statute, 23 Okla.Stat.tit., § 9, and this award has been reviewed, not only by the trial court when ruling on the Wolfbergs' post-trial motions, but also by the Tenth Circuit. In *TXO*, this court upheld as constitutional a jury award of $19,000 actual damages and $10,000,000 punitive damages in a lawsuit where the defendant was found to have intentionally and knowingly brought a declaratory judgment action without cause and to further an improper collateral business scheme. 133 S.Ct. 2711 at 2722. In so doing, this court rejected the notion of any bright-line test of constitutionality for awards of punitive damages, and instead

chose to examine the potential of harm which could have resulted from the defendants' behavior. *Id.* As this court explained:

> The punitive damage award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, and petitioner's wealth, we are not persuaded that the award was "so grossly excessive" as to be beyond the power of the State to allow.

Id. at 2722-23. Like the defendants in *TXO*, the Wolfbergs intentionally and knowingly brought unfounded lawsuits to achieve an improper collateral purpose. Those lawsuits sought millions of dollars in punitive damages against Greenberg personally. The potential harm to Greenberg, had they once succeeded, would have been his emotional and financial destruction. The actual harm, not only financially but emotionally as he faced this onslaught, was significant. *TXO* certainly provides no basis for further review of this award.

A comparison of the facts in this case to those in *BMW* provides no basis for granting the Wolfbergs further review. In *BMW*, the jury awarded $4,000 actual damages and $4,000,000 in punitive damages based on the failure of an auto manufacturer and an auto distributor to disclose that cars had been repainted subsequent to manufacture. On appeal, the Supreme Court of Alabama ordered a reduction of the punitive damage award to $2,000,000, thereby reducing the ratio of punitive damages from 1000 to 1 to 500 to 1. 646 So.2d 619 at 629. In

that case it appeared that the jury had based the punitive damage award, at the suggestion of plaintiff's counsel, on evidence that defendants had similarly failed to disclose repainting on nearly 1000 cars total. Additionally, it appeared that only 11 to 14 of those cars were sold in Alabama, where the case was prosecuted.

The ratio of actual damages to punitive damages in the present case is not even remotely similar to those at issue in *BMW*. There is ample evidence to support the actual damage award of $284,000, and the record is replete with evidence of the Wolfbergs' malice toward Robert Greenberg, evidence sufficient to justify the punitive damages, especially considering the uncontroverted evidence of the Wolfbergs' wealth. Nor is the extraterritoriality issue present here: even the one case which was filed in Kansas was designed to cause, and did cause, damage to Robert Greenberg and his interests in Oklahoma. *BMW* offers no support to the Wolfbergs.

There is no reason to hold this case in abeyance pending a decision in *BMW*. Since the filing of the petition for writ of certiorari in *BMW*, this court has denied certiorari in several punitive damage cases. *See Berj Boyajian v. Olfacto-Labs*, 63 USLW 3756 (U.S. May 30, 1995) (No. 94-1636); *AJ & AJ Servicing, Inc. v. Tudor Assoc., Ltd.*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1380); *M. Harold Ezzone v. Willis M. Hansen*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1513); *Ferrellgas, Inc. v. Clay*, 115 S.Ct. 1102 (1995) (No. 94-1066); *Dow Corning Corp. v. Hopkins*, 115 S.Ct. 734 (1995) (No. 94-861); *Figgie v. Moskovitz*, 115 S.Ct. 668 (1994) (No. 94-781). Because this Court has declared punitive damages are not in and of themselves unconstitutional, it would unduly protract

this litigation to hold it in abeyance pending this Court's decision in *BMW*.

2. NOTHING IN THE INSTANT CASE JUSTIFIES REVISITING THE CONSTITUTIONALITY OF PUNITIVE DAMAGES.

The Wolfbergs seek to characterize their verdict as "substantially similar" to that in *BMW*, where the ratio of punitive damages to actual damages was originally 1000 to 1 and was reduced to 500 to 1. At the same time, they seek to portray the damage awarded to Greenberg as being a relation between "$2,250,000 in punitive damages as compared to $34,000 in out-of-pocket costs." This is both disingenuous and inaccurate. Robert Greenberg was awarded $284,000 in actual damages against Laurance and Carolyn Wolfberg, who were found to be jointly and severally liable for this damage. The relationship that must be considered by this Court is the amount of the punitive award compared to the magnitude of the wrong. On that basis, the award is fully justified. In addition, when the punitive damages assessed against each is compared to this accurate actual damage figure, the ratio for Laurance Wolfberg becomes at most slightly over 6 to 1, and the ratio for Carolyn is less than 2 to 1. Given the evidence of malice with which the jury was presented, the potential for harm to Robert Greenberg which could have resulted from the five groundless lawsuits, the actual harm which he suffered, and the wealth of the Wolfbergs, these are reasonable ratios which do not offend due process.

The Wolfbergs are being similarly deceptive in their argument that "punitive damages were awarded for conduct never previously recognized as tortious under Oklahoma law." Petition at 12. Malicious prosecution and abuse of process had been recognized as torts in Oklahoma for decades prior to the Wolfbergs' bringing any of these lawsuits. Certainly their lawyers, who repeatedly warned the Wolfbergs that there was no basis for bringing the actions and continuing groundless appeals, were aware of this.[7] Because the Wolfbergs were engaging in behavior recognized as tortious *each* time they maliciously prosecuted or abused process, they surely cannot be heard to complain merely because together, they had the malice and the wherewithal to do so *ten* times.[8]

The Wolfbergs' argument that this award is a dangerous anomaly under Oklahoma is also strained. They compare this action, based on a series of five lawsuits spanning a five year period with millions of dollars potentially at stake, with cases like *Moore v. Target Stores, Inc.*, 571 P.2d 1236 (Okl.App. 1977),[9] where a woman was

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[7] Greenberg produced several such letters, obtained from the files of various Wolfberg counsel, which were exhibits at trial. App. 27a.

[8] The jury specifically found that each predicate case constituted both malicious prosecution and abuse of process. If anything, the fact that this action was brought based on five predicate lawsuits heightened Greenberg's burden both at trial and on appeal, including certified questions to the Oklahoma Supreme Court.

[9] Significantly, the Oklahoma Court of Appeals observed in *Moore* that "an exemplary damage verdict is peculiarly within the province of the jury, and will not be casually interfered with on grounds of excessiveness." 571 P.2d at 1241.

arrested for shoplifting and detained for part of an afternoon. The fact is, this case represents a rare situation – as is evidenced by the certification of questions to the Oklahoma Supreme Court – and there are no analogous cases to which it can be readily compared. Nonetheless, such tortious behavior should not go unpunished.[10]

As for the Wolfbergs' argument that this award is not analogous to criminal fines for barratry, it is notable that the Oklahoma Statutes allow civil tort actions for both malicious prosecution and abuse of process, and punitive damages in cases where malice is evident.[11] In this case, both the trial court and the Tenth Circuit were aided by Oklahoma statutes and common law precedent, and the Tenth Circuit had the guidance of the Oklahoma Supreme Court on certified questions. Certainly this dispatched the duty of federal courts under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1939).

Finally, the Wolfbergs attempt to in effect argue that the punitive damage award is improper because "they are

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[10] Punitive damages serve a deterrent function not only as an example to society, but also to deter the defendants from continuing to file groundless lawsuits. As Judge Alley noted in his denial of the Wolfbergs' post-trial motions, the punitive damage award in this case had to be large in order to prevent them from repeating their conduct. Petition at 27a.

[11] This Court should similarly disregard the Wolfbergs' comment that there is no precedent for awarding punitive damages for abuse of process. The Oklahoma Supreme Court, in answering the certified questions, had ample opportunity to review the tort of abuse of process, and apparently had no quarrel with classification of abuse of process as a civil tort for which punitive damages are proper.

not actually as wealthy as they represented themselves to be on their financial statement in 1987." This argument is specious. First, the evidence submitted at trial consisted of a (1) financial statement which they themselves prepared (App. 23a); (2) testimony by Laurance Wolfberg as to his pre-tax annual income of over $1,000,000 (App. 25a); and (3) testimony by Laurance Wolfberg as to 22 million dollars received from the sale of his home on Kahala Boulevard in Honolulu (App. 25a). This country's judicial system was not designed to allow a rich man and his wife to misuse the courts to intentionally and wrongfully destroy another person. Litigation tactics calculated to victimize the opponent should not be condoned.

The Wolfbergs had their day in court – several times. They were made fully aware of the potential consequences of their wrongful acts. If ever a case merited a punitive damage award, this case does. The Wolfbergs are not penitent over what they attempted to do and their arguments that punitive damages should be held unconstitutional in this case seeks to beggar the purpose for such awards.

CONCLUSION

The punitive damage award in this case is neither so large, either in amount or in proportion to the $284,000 actual damage award, nor so disproportionate to the wealth of the defendants, as to offend due process. The Wolfbergs' efforts to analogize to *BMW* are a cynical smokescreen, created to further prolong this litigation. The trial court and the Tenth Circuit Court of Appeals

have reviewed both the merits of the case and the jury verdict based upon the evidence presented, and have found nothing wrong.

The Respondent respectfully objects to the Petition for Certiorari and requests the same be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LAURENCE B. WOLFBERG, Plaintiff	)	
vs.	)	No. CIV-86-2441-C
ROBERT I. GREENBERG, Defendant	)	

MEMORANDUM OPINION

(Filed Dec. 17, 1987)

Parties and counsel in this case, having consented to proceed before a United States Magistrate, 28 U.S.C. §636(c), appeared for nonjury trial before the undersigned on November 17 and 18, 1987. Testimony and exhibits were offered and admitted, and the Court has now received supplemental briefs and proposed findings of fact and conclusions of law from both counsel. Having duly considered the evidence and the law, the Court enters the following memorandum opinion, which shall constitute its findings of facts and conclusions of law.

The parties in this case are brothers-in-law who formed a partnership for the purpose of exploring and developing oil and gas properties beginning in 1975. The partnership was known as Green Wolf Oil Company. Greenberg (defendant) and Wolfberg's (plaintiff's) wife are the only children of Mal Greenberg, who owned considerable property at his death, a piece of which formed the original basis for Green Wolf Oil Company.

Originally, at the outset of Green Wolf, Wolfberg resided in Kansas and also operated a family business known as Service Business Forms in Wichita. At the same time, Greenberg resided in Oklahoma City and also operated a family business known as Seiberling Latex Products, Inc. Relations between the brothers-in-law, both business and personal, were always excellent until the early 1980's. Mal Greenberg had wanted each to be in business with the other, and had started each in the family business. In 1969, a parent or holding company was created, Service Computer Forms, which wholly owned both Service Business Forms and Seiberling. Wolfberg and Greenberg owned equal shares, and Mal (later his testamentary trust) owned a small percentage. In any event, the family businesses, both those mentioned above and other ventures, were profitable and amicably run.

In 1979, Green Wolf began charging a $300-per-well administrative charge shared, with respect to each well, by the joint interest owners, including Green Wolf. This charge was neither uncommon nor excessive, and has not been raised since. In 1980-81, Wolfberg moved from Wichita to Hawaii, then to Oklahoma City and back to Hawaii. He operated Service Business Forms from each new residence. Seiberling Latex Products was liquidated, resulting in considerable cash gain, which was held by Service Computer Forms, the parent company.

In the spring of 1981, Greenberg was approached by an uncle, Robert Zeligson, whose business acumen and judgment Greenberg trusted and admired, about forming a well servicing company in which Greenberg, Zeligson's son, and Griffith, who had experience in well servicing, would be principals. The company would be known as

Griffith Resources, and Zeligson wanted Greenberg to serve as chief executive and financial officer. Greenberg was extremely interested in the prospect, but declined to participate unless Zeligson would allow a 50/50 participation by Wolfberg. Because of the Green Wolf partnership, both men considered all oil and gas ventures (and apparently others, as well) to require joint participation or none at all. Zeligson agreed to the participation of Wolfberg only if Wolfberg had no active role in management, and his ownership share was held in trust. Wolfberg agreed to this proposal, and the joint interest of Wolfberg and Greenberg was placed in the Mal Greenberg Testamentary Trust, and later, at Wolfberg's insistence, a different trust was created to hold the Griffith interest. There was nothing, then or later, about the ownership or formation of Griffith Resources, Inc., that was kept from Wolfberg or done without both his knowledge and approval. Wolfberg did not appreciate and in fact resented being left out of management, and the decision by Zeligson to exclude him rankled, both then and now. It was apparently over the formation of Griffith Resources that the relationship of the brothers-in-law started to crumble.

In October, 1982, it was decided and agreed between the brothers-in-law that their interests should be separated, to the extent practicable and possible. Wolfberg purchased Greenberg's share of Service Computer Forms for the cash generated by the sale of Seiberling Latex Products. Wolfberg purchased the share of the Mal Greenberg Testamentary Trust in Service Computer Forms by executing a note to the Trust. The parties maintained their partnership in Green Wolf, but agreed that Greenberg

would run the partnership, as well as supervise their joint interest in Griffith Resources and the family trusts through a new company he would form to be known as Alpha Management Company. Alpha Management, from its inception, collected the $300-per-well charge from participating owners, including Green Wolf.

In 1983, after two productive and profitable years, Griffith Resources experienced the same decline in drilling and well activity with which the entire industry was faced. In the spring of 1983, the First National Bank, from which Griffith Resources had borrowed approximately four million dollars, required a significant reduction of debt before Griffith's loan would be renewed. Griffith was faced with the choice of putting capital in the neighborhood of one million dollars into the company, or face foreclosure of the Bank's interest. Greenberg had personally guaranteed $500,000 of this debt. Wolfberg and Greenberg met in Hawaii about this time, and discussed the need to meet the cash call. Following the meeting, Wolfberg wrote a letter to Greenberg proposing that their share of the debt reduction be paid by borrowing through Green Wolf and loaning the money to Griffith Resources. This was ultimately done, and the bank's requirements were satisfied. The note from Griffith Resources to Green Wolf was later subordinated to the bank's note, as a requirement for a later renewal. Griffith Resources continues to be a viable if not profitable entity, and to reduce its debt.

During this time, Wolfberg suffered extreme health problems, having had cancer, resulting in a lengthy hospital stay and recuperation, and having suffered severe mental problems in the winter of 1984 and spring of 1985,

also resulting in hospitalization and recuperation. In December, 1984, following a telephone conversation on the same subject, Greenberg, by letter, announced his withdrawal from the Green Wolf partnership. Greenberg requested that Wolfberg make any suggestions for dissolution he thought appropriate, execute documents designed to facilitate the transfer of ownership. Wolfberg never responded to Greenberg's requests, nor corresponded or communicated with Greenberg in any way, from that point on, concerning the dissolution, management, or operation of Green Wolf.

Greenberg continued to operate Green Wolf's wells through Alpha Management, making a capital distribution to the partners in May, 1985, and August, 1985. The partnership debt, originally expected to be paid in February, 1986, was not paid until April, 1987. The Partnership note was renewed by Greenberg in August, 1985, without the knowledge or permission of Wolfberg.

Following institution of this suit, an audit of partnership accounts was undertaken by Wolfberg's representatives. Following the audit, Wolfberg's allegations of wrongdoing are: (1) that the receipt by Alpha Management of the $300-per-well operating charge from Green Wolf resulted in a profit to Alpha and thus Greenberg to which he was not entitled, the theory of recovery being based on either breach of agreement or breach of fiduciary duty or both; (2) that the $400,000 loaned by Green Wolf to Griffith Resources should have been a debt of Greenberg rather than of Green Wolf, because Greenberg misrepresented the circumstances of the transaction; and (3) that the renewal of the Green Wolf note in August,

1985, after the partnership ceased, was a wrongful act on Greenberg's part.

The $400,000 borrowed by Green Wolf was for the benefit of Griffith Resources, Inc., and with it and $600,000 obtained from another principal, Griffith Resources' indebtedness with First National Bank was reduced. This debt reduction was a requirement of the Bank before it would renew or extend existing notes. Failure to make this payment would have resulted in foreclosure of the bank's interest and the complete collapse of Griffith Resources. The Court finds that contrary to plaintiff's allegation, the purpose of the one million dollar payment was not to relieve Greenberg's liability on his personal guaranty, but to prevent foreclosure of the bank's interest. The Court finds that Wolfberg, plaintiff herein, was fully aware of the purpose of the debt reduction. The loan of $400,000 from Green Wolf to Griffith Resources was his suggestion and for the purpose of bailing out their joint faltering investment, to protect his brother-in-law from liability. The Court finds that Wolfberg knew that Greenberg was not personally liable for the entire four million dollar debt to the bank, or for the one million dollar cash call, and further knew that the purpose of the cash infusion into Griffith was to keep it afloat in hopes of better days soon in the oil industry. The Court finds that Wolfberg's testimony concerning the circumstances surrounding the Griffith Resources note is incredible and that the unbelievability of Wolfberg's testimony in this regard taints his credibility with respect to every other issue. Wolfberg is an experienced investor, entrepreneur, and, by his own description, a deal maker, and his purported misunderstandings concerning the

nature of his ownership in Griffith Resources, his liability for a cash call, Greenberg's liability, and the purpose of the debt reduction are completely unbelievable, especially considering his letter to defendant following their meeting.

In short, the Court finds no breach of fiduciary duty on the part of Greenberg with respect to the Griffith Resources note. The Court finds that Wolfberg had no misunderstanding, but, if in fact he did, it was not due to any misrepresentation by Greenberg.

With respect to Wolfberg's claim that Greenberg wrongfully renewed a partnership debt after dissolution of the partnership, the Court finds no wrongful conduct on the Part of defendant. It is required, as part of his fiduciary duty, that defendant wind up the partnership affairs in a reasonable time. Following defendant's letter of December 19, 1984, wherein he announced his intention to withdraw from the partnership, defendant continued to operate the partnership affairs for the purpose of retiring the partnership debt. Capital distributions were made to the partners twice following defendant's letter announcing his withdrawal. It is plaintiff's contention that those capital distributions should have been used to reduce the debt and that defendant's failure to retire the debt earlier, and his renewal of the partnership note, both constitute a breach of fiduciary duty. Plaintiff's claim must fail for two reasons. First, he can show no damage inuring to him as a result of the extension of the partnership debt or the distribution of capital to the partners. Both were to his benefit, as he received cash equal to that of defendant in the capital distribution. Plaintiff cannot be heard to now complain of capital distributions when

he accepted them when made without protest or suggestion to the contrary, or any communication whatsoever concerning the management or operation of Green Wolf or the retirement of its debt. As Green Wolf continued to profit despite declining oil revenues as a result of the renewal of the partnership note, regardless of the benefit to plaintiff, the Court finds that in renewing the note defendant acted within his duties as a responsible and cautious manager. Plaintiff can claim no breach of fiduciary duty when the actions taken by defendant were to the benefit of plaintiff and appear to be reasonable and prudent in the operation of the partnership.

The final issue for decision is the propriety of Greenberg's company, Alpha Management, charging Green Wolf its share of the $300.00 per month per well administrative charge. As mentioned above, Green Wolf, itself, had charged $300.00 per month per well to its investors since 1979. The amount was reasonable. The charge is designed to cover the administrative and accounting costs incurred to operate each well. Although Green Wolf billed itself for its proportionate share of the $300.00 monthly fee, it never paid its share until Alpha Management took over the operation of the wells. When the parties attempted to split their joint interests in 1982, but maintained their partnership in Green Wolf, Greenberg took over management of Green Wolf through his wholly-owned company, Alpha Management. There was no formal agreement concerning the $300.00 charge, but Alpha collected it from Green Wolf from the beginning. In his letter of resignation from the partnership in December, 1984, Greenberg indicated his intent to continue operating the Green Wolf properties through Alpha, further

providing that any "benefits received from our other partners would continue to be shared equally between us." (Plaintiff's Exhibit 2) Plaintiff devoted much time at trial to attempting to prove that the income to Alpha from the monthly charge was in excess of its expenses reasonably related to operating the Green Wolf wells, and that therefore defendant had breached his fiduciary duty.

Plaintiff cites law standing for the proposition that one partner may not make a profit for himself individually out of the partnership business. Uniform Partnership Act (OKLA.STAT. tit. 54, §221(1); KAN.STAT.ANN. §56-321 (1983)); *Phillips v. Kula 200, Wick Realty, Inc.*, 2 Haw.App. 206, 629 P.2d 119 (Haw.Ct.App. 1981). Plaintiff further cites law standing for the proposition that a partner, occupying a fiduciary position with respect to his other partners, owes a higher and greater duty to a partner than to one with whom he deals at arms' length. *In Re Longhorn Securities Litigation*, 573 F.Supp. 255 (W.D. Okla. 1983); *Oklahoma Company v. O'Neil*, 440 P.2d 978, 984 (Okla. 1968). While plaintiff concludes that these authorities support the proposition that defendant breached his fiduciary duty by profiting through Alpha Management, from the well charge paid by Green Wolf, plaintiff does not explain how he himself can be exempted from the duty to treat a partner fairly which he would impose upon defendant. In this case, plaintiff withdrew completely from partnership affairs as early as 1982, living in Hawaii and operating Service Computer Forms, all other family shares of which he had purchased for himself. He left the complete day-to-day operation and management of Green Wolf to the defendant, and refused to communicate in any way with defendant regarding the dissolution

of the partnership. When Alpha Management took over the operation of Green Wolf properties in 1982, it commenced paying the salaries of employees, formerly paid by family businesses, whose duties still involved family interests (including plaintiff's) other than Green Wolf. Alpha assumed the cost of office space, employee salaries, and other legitimate business expenses which plaintiff would otherwise have had to pay for individually, to protect his share of the family interests being run by Alpha. The testimony of Greenberg was that he never took a salary from either Alpha or Green Wolf and, in fact, Alpha never made a profit and required his capital infusion to continue operations. Additionally, Alpha assumed the risk of loss if any well had required expenses in excess of the monthly fee. While plaintiff claims that he never knew Alpha was charging this fee to Green Wolf, it is through his own neglect of partnership affairs that he did not know, if in fact he did not. No effort was made by Alpha or Greenberg to hide the charge from Wolfberg, and defendant's letter assuring that benefits from other partners would continue to be shared clearly stated the status quo would be maintained. The monthly charge had been collected from Green Wolf for two years when that letter was written and no agreement to the contrary is evidenced by the letter. The Court finds that no agreement existed that Alpha would not charge Green Wolf its share of the monthly fee. The payment by Green Wolf to Alpha prevented plaintiff's personal liability for management fees, the fee itself was reasonable, and neither Alpha nor Greenberg made a profit from the monthly charge to Green Wolf. The Court thus further finds that the imposition of the monthly well

charge against Green Wolf was not a breach of fiduciary duty.

In accordance with the foregoing, the Court finds that plaintiff has failed to sustain his burden of proof on any of his alternative theories of recovery. Plaintiff is, however, as agreed by all parties, entitled to a dissolution of the partnership, and conveyances to accomplish that end have apparently been agreed upon by the parties. It is therefore the order and judgment of this Court that plaintiff have and recover nothing against defendant by way of his claims of breach of agreement or breach of fiduciary duty, and that the parties execute any deeds, conveyances, and agreements necessary to achieve full dissolution of the Green Wolf partnership. A judgment shall enter accordingly.

IT IT SO ORDERED this 17 day of December, 1987.

/s/ Robin J Cauthron
ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

APPENDIX B

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
WICHITA, KANSAS
67203

ROBERT C. HELSEL
JUDGE

January 25, 1990

Sherwood, Hensley, Harper & Gregory
Attorneys at Law
Riverfront Place – 833 North Waco
P.O. Box 830
Wichita, Kansas 67201

Attention: Kurt Harper

Adams, Jones, Robinson and Malone, Chartered
P.O. Box 1034
600 Market Centre
155 No. Market
Wichita, Kansas 67201-1034

Attention: John Seeber

Re: Wolfberg vs. Greenberg, etal
88 C 3346

Gentlemen:

The Court after hearing the evidence and argument of counsel, and upon being fully advised in the premises makes the following Findings of Fact, to wit:

1. Mal Greenberg, the decedent was married to Rose Greenberg and had two children, Carolyn Greenberg Wolfberg the plaintiff in this action, and Robert Greenberg one of the defendants in this action.

2. Mal Greenberg died July 23, 1971 survived by his wife and his two children. Mal Greenberg in his will made certain specific bequests and then created what is commonly known as a Marital Deduction Trust for the use of his wife, Rose Greenberg. The decedent further provided in Article V of his will that after the payment of specific bequests and the establishment of the Marital Deduction Trust for the use and benefit of his widow, that the balance of his estate should go to his wife, Rose Greenberg and to his son Robert I. Greenberg and to a nephew, Maynard Greenberg as trustees, and the trust to be held for the benefit of his wife, his children and their issue.

3. This trust provided that the net income of a trust should be paid to Rose Greenberg in quarter-annual or more frequent installments, as long as she should live. The trust further provided that the trustees could disperse the principle of the trust to Rose Greenberg as might be necessary or appropriate to provide for her maintenance, welfare, comfort or to support or to meet an emergency or extra ordinary expense.

4. Upon the death of Rose Greenberg, the trustees were to divide the trust estate into two equal parts. One part which would be forthwith conveyed to Robert I. Greenberg, if living or if he is not living, then in trust for his issue as provided in the will.

5. The remaining part of the trust was to be held in trust for the benefit of his daughter, Carolyn Greenberg Wolfberg. The trustees were to remit the net income of the trust to her in quarter-annual or more frequent installments for as long as she should live. The trustees

were authorized to disperse from the principle of the trust such amount of the principle as the trustees should consider necessary for the health, support, and maintenance of his daughter or to meet any emergency affecting her or her family such as medical or dental care. Upon the death of Carolyn Greenberg Wolfberg, the principle was to be distributed as provided in the will.

6. The will of the decedent granted absolute discretion to the trustees and further provided that the beneficiary should not have the right or power to anticipate by assignment or otherwise any income or corpus given to such beneficiary by this instrument or any portion thereof.

7. The powers granted to the trustees gave the trustees unbridled and unlimited powers of discretion to do what they thought was best in the execution of their duties as trustees. It would appear from reading the will that the trustees have the power and discretion to do anything that the decedent could do if he were still alive.

8. Carolyn Greenberg Wolfberg is married to Laurence Wolfberg. For a number of years, Laurence Wolfberg has been suffering from a severe mental illness which has adversely affected his thinking concerning his father in law's estate. That Robert I. Greenberg in the fall of 1984 was summoned by his sister for help in a perceived financial crises which in fact did not exist to help her and her husband. That during this period of time Robert I. Greenberg went to the home of the plaintiff, Carolyn Greenberg Wolfberg and her husband in Honolulu, Hawaii and spent several days reviewing his sister and brother in law's financial condition.

9. Mr. and Mrs. Wolfberg had a friend one Marsha Stearn who is a realtor in Honolulu and who in fact had sold to Mr. and Mrs. Wolfberg their rather expensive home in Honolulu. One of the perceived problems in connection with the Wolfberg financial crises was the mortgage payments on their home. Mr. and Mrs. Wolfberg had authorized Mr. Greenberg to talk to Mrs. Stearn about the value of their home and the possibility of the sale of the home. Mr. Greenberg had an appointment on a day certain to have this conversation with Mrs. Stearn. The day before that appointment was to be kept Mrs. Stearn, Mr. Greenberg and Mr. and Mrs. Wolfberg had gone to dinner. After returning to the Wolfberg's from dinner Mr. Greenberg was talking to Mr. and Mrs. Stearn and at that time made inquiry as to the value and the saleability of their home.

10. This conversation between Robert I. Greenberg and Marsha Stearn created a violent outburst by Carolyn Greenberg Wolfberg wherein Mrs. Wolfberg verbally berated Robert Greenberg and was so mad as to almost be out of control.

11. Robert I. Greenberg made no response to this verbal abusive attack but advised Mr. and Mrs. Wolfberg that he thought that it was better that he not have anything to do with their financial affairs.

12. The Court finds that the verbal attack by Mrs. Wolfberg on her brother, Mr. Greenberg was completely unreasonable and without justification.

13. The Court further finds the Robert I. Greenberg is an intelligent, sensitive person who was deeply hurt by

his sister's unwarranted attack upon him and his credibility and that ever since said date, Mr. Greenberg has thought it best to avoid possible confrontations with his sister or his brother in law by not being at family gatherings where they might be.

14. Robert I. Greenberg did attempt to affect a reconciliation in early 1985 by offering to take his sister to dinner in Dallas, Texas but that Carolyn Greenberg Wolfberg rebuffed the attempt.

15. That Carolyn Greenberg Wolfberg has never made a request to the trustees of the Mal Greenberg Testamentary Trust for any money for herself from the trust.

16. That in November of 1984 the resources of the plaintiff, Carolyn Greenberg Wolfberg and of her husband, Laurence Wolfberg were substantial and included approximately one million dollars of pre-tax income a year together with the home in Honolulu which the plaintiff valued at ten to fifteen million dollars.

17. That Carolyn Greenberg Wolfberg has never requested a loan from the trustees of the Mal Greenberg Testamentary Trust.

18. Thereafter, Carolyn Greenberg Wolfberg and Laurence Wolfberg have instituted numerous law suits in state and federal court in Oklahoma against Robert I. Greenberg. That Mr. and Mrs. Wolfberg have lost all of these law suites [sic] and appeals to the Circuit Court of Appeals, Tenth Circuit.

19. That these law suits were precipitated by the trustees of the Mal Greenberg Testamentary Trust, calling

a promissory note which was delinquent. This note was in the principle amount of One Hundred and Two Thousand Dollars ($102,000.00) and was payable to the Mal Greenberg Testamentary Trust from Service Computer Forms Industries, Inc. which was a corporation owned by Mr. and Mrs. Wolfberg.

20. That the various cases filed by Mr. and Mrs. Wolfberg have been irritating to the trustees of the trust. That the trustees and especially Robert I. Greenberg have shown remarkable restraint in spite of provocations and have, in the opinion of the Court dealt properly with Mr. and Mrs. Wolfberg.

21. That all of the judgements in the Oklahoma litigation are final and are Res judicata.

22. That this action has been filed to remove the trustees of the Mal Greenberg testamentary trust because of alleged hostility by the trustee toward Carolyn Greenberg Wolfberg. The Court specifically finds that there is no hostility by the trustees toward Mrs. Wolfberg. That the hostility which might exist is hostility by Laurence Wolfberg toward his brother in law, Robert Greenberg which hostility has been precipitated by Mr. Wolfberg's mental illness, and which hostility has been apparently adopted by Mrs. Wolfberg.

23. That Rose Greenberg has not drawn the income which she is entitled to from the Mal Greenberg Testamentary Trust but has allowed a great amount of this income to remain with the trust and to be accumulated for the benefit of the ultimate beneficiaries of that trust

including Carolyn Greenberg Wolfberg. This is not hostility but is evidence of a concern of a mother for her daughter.

The Court makes the following Conclusions of Law, to wit:

1. Under the will of Mal Greenberg, deceased, there are two trusts one being the Rose Greenberg Marital Trust and the second the residual trust being the Mal Greenberg Testamentary Trust. There is only one beneficiary entitled to payments under those trusts at this time, to wit: Rose Greenberg, the widow of the decedent and one of the Co-Trustees of the two trusts. Rose Greenberg is entitled to all of the income from both trusts and so received payment of principle for certain purposes as set forth in the will.

2. There is no provision in the will of Mal Greenberg for Carolyn Greenberg Wolfberg so long as her mother is alive to receive either income or principle from either of the trusts created in the will of Mal Greenberg. Carolyn Greenberg Wolfberg will have no right to payment of income from the Mal Greenberg Testamentary Trust until after the death of Rose Greenberg.

3. The hostility of Carolyn Greenberg Wolfberg and Laurence Wolfberg toward the trustees of the Mal Greenberg Testamentary Trust and more especially towards Robert I. Greenberg is not grounds for removing the trustees of the trust from their position as established by the decedent in his will. The trustees in all instances as far as can be ascertained by the Court have acted properly and in the best interests of the beneficiary, Carolyn Greenberg Wolfberg.

4. No legal or factual basis has been shown by the plaintiff for removal of the trustees and the Court finds and holds for the defendants and against the plaintiff.

5. The removal of a trustee is a drastic action which should only be taken when the estate is actually in danger and the intervention is necessary to save trust property. This is especially true where the trustees are named by the settlor of the trust. There has been no evidence to justify such action by the Court.

I will ask Mr. Seeber to journalize this matter.

Respectfully yours,

/s/ Robert C. Helsel
Robert C. Helsel

District Judge-Div. 20

APPENDIX C

TEXT OF LETTER DATED SEPTEMBER 15, 1988 FROM COUNSEL TO LAURANCE B. WOLFBERG ADMITTED AS ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 94

* * *

Mr. and Mrs. Laurance B. Wolfberg
c/o Marriott Hotel
2151 Avenue of the Stars
Los Angeles, California 90067

Re: Carolyn Wolfberg – Trust

Dear Larry and Carolyn:

I have performed some preliminary research in regard to the possible statute of limitations claim that the trustees could assert against you in the above referenced matter.

As I stated to Larry over the telephone, if the lawsuit is not refiled by September 16, 1988, my preliminary research indicates that it is not entirely conclusive as to how the Kansas court would treat the Oklahoma statute of limitations discussed in our previous conversations. With this in mind, I believe that it is best to be as cautious as possible and try to obtain a filing in Kansas of at least a preliminary Petition that may be amended at a later date. However, as stated over the telephone, it is possible that a Kansas court would not apply the Oklahoma rule at all and the September 16th deadline may not make any difference, but that is a judgment decision that you must make.

As stated on several occasions, we will not be able to represent you on this matter in Kansas and that we will

not be able to help or do you any good with any refiling in Oklahoma. Larry, I believe you agree that the Kansas courts are the best place for this case, as Oklahoma courts allow the Greenbergs the "hometown" advantage. In fact, any refiling in Oklahoma to attempt to preserve any rights may present more problems on your behalf, as the case would probably do better in the neutral courts of Kansas. Further, it is very difficult, if not impossible for this firm to try to determine how to best help this situation, when the Dallas firm would be the firm to bring and maintain the trust action and is the firm presently taking care of that matter. Therefore, it is my recommendation to have the Dallas firm file at lest a preliminary Petition in the Kansas court by September 16, 1988 deadline, and then amend the Petition to include whatever causes of action they deem necessary or proper to bring before serving the Petition upon the trustees.

If you have any questions or comments, please do not hesitate to contact this me. [sic]

Very truly yours

s/ Clay C
J. Clay Christensen
For the Firm

APPENDIX D

EXCERPTS FROM TRIAL COURT'S RULING AS TO INSTRUCTION ON PUNITIVE DAMAGES

* * *

And that brings me to the last item of business today, the application 23 Oklahoma Statute, Section 9. Following the provisions of the statute, I find, after the evidence has been concluded, and from the record, and prior to the submission of the case to the jury, and outside the presence of the jury, that the jury has been presented clear and convincing evidence that the defendants are guilty of conduct evincing wanton disregard for the rights of others, oppression, fraud, and malice. The wanton disregard being the attempt to, and in some case successful attempts, to pursue litigation without any basis at all, to include appeals contrary to the advice of counsel.

* * *

The jury has been presented clear and convincing evidence that the lawsuits were oppressive. They could conclude that false testimony was given in those cases which would constitute a species of fraud. And they have a great deal of evidence, as is even conceded by Mr. Barnes in his brief, that what actuated these lawsuits was malice.

So the case is presented without any cap on punitive damages.

* * *

APPENDIX E

SERVICE COMPUTER FORMS INDUSTRIES INC.

Executive Offices:
4615 Kahala Avenue
Honolulu, Hawaii 96816

CONFIDENTIAL

LARRY WOLFBERG AND CAROLYN WOLFBERG

AND FAMILY PARTNERSHIP

May 1, 1987

ASSETS	
Cash on Hand & in Banks	$ 1,005,460
Money Fund & Savings	506,477
Accounts Receivable/SBF	1,055,360
Accounts Receivable/Bank	5,000,000
Securities	
U.S. Government Bonds (TIGR)	730,000
Other Investments & Contracts	
Griffith Resources (14%)	1
Miscellaneous Equities	1,150,000
Oil & Gas Investments	2,250,000
Real Estate	13,113,000
Personal Property	1,770,000
Insurance (Cash Value)	13,600
TOTAL ASSETS	$26,593,898

LIABILITIES	
Bills Payable	$ 4,500
Mortgages	3,068,832
Total Liabilities	$ 3,073,332
NEW WORTH	$23,520.566
TOTAL LIABILITIES & NET WORTH	$26,593,898

APPENDIX F

EXCERPTS OF TRIAL TESTIMONY OF LAURANCE B. WOLFBERG

* * *

THE COURT: The objection is overruled. Tell us how much you got for your house.

THE WITNESS: The gross amount was 22 million.

THE COURT: And did you have to discharge a mortgage, incidentally, as part of closing?

THE WITNESS: Yes, sir, I did.

THE COURT: And that would result in a deduction of what?

THE WITNESS: Well, it took the mortgages and all the bills and different things against it before we start considering tax consequences of about 16 million, I think.

* * *

Q From November '86 till today, what's your financial condition?

A Well, beginning of November '86 it – well, let's put it this way: Starting in November I was – I have been fortunate enough to improve my balance sheet and my holdings and my businesses since January 1986. And if you ask me specifically on November '86, I would have to take a look and and determine what my real worth, not what my net worth indicated.

Q Well, Mr. Wolfberg, in January of 1990 Judge Helsel found that you had pretax income of approximately one million dollars a year. Was that accurate?

A In 1990?

Q Yes.

A I believe that was accurate.

* * *

APPENDIX G

TEXT OF LETTER DATED SEPTEMBER 7, 1989 FROM COUNSEL TO LAURANCE B. WOLFBERG ADMITTED AS ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 65

* * *

Mr. Larry Wolfberg and Mrs. Carolyn Wolfberg
c/o Service Business Forms
815 E. 2nd St.
Wichita, Kansas 67202

Re: Carolyn Greenberg Wolfberg v.
Robert I. Greenberg, et al.
Case No. 88 C 3349

Dear Mr. and Mrs. Wolfberg:

The firm and the undersigned hereby withdraw as your counsel of record in the referenced case and otherwise terminate all aspects of our relationship with you. We will file the necessary motion to withdraw with the court as soon as possible. We will promptly forward all proper files to successor counsel and will provide such reasonable and good faith assistance as he may request of us. We have incurred fees and expenses as of today of approximately $1,000 more than your retainer with us; we will absorb that amount.

Our reasons for withdrawal are as follows: We undertook to represent your wife in accordance with the terms of our letter to you dated December 6, 1988. That letter is incorporated herein by this reference. Our representation was essentially to seek the removal of the Trustees under the Mal Greenberg Testamentary Trust. We specifically

stated that we would not be associated with any vindictive lawsuit, the intent of which was to impose severe punishment on or to seek massive damages from the Trustees in general or Robert I. Greenberg in particular, nor were we willing to be associated in any legal action which was characterized by a spirit to obtain these ends.

In the months since our letter, you in particular and Carolyn to a limited extent have persistently sought to expand this case beyond the foregoing limits. It is clear that you and Carolyn, to the extent she may be informed about what is going on, do not intend to abide by either the letter nor the intent of our letter. You have repeatedly stated that removal of the trustees is not what you want to accomplish, and have consistently tried to direct the primary focus of the suit to other areas. Those other areas involve issues of the kind which we specifically said we would not undertake in this action, or issues which we – and several other local attorneys – have advised you are not justiciable in Kansas. Nonetheless, each of our meetings and telephone conversations have been devoted almost exclusively to your attempting to expand the suit and our attempting to explain that we could not do so.

As a result, our relationship with you has deteriorated to such an extent that we do not believe we can continue to represent you effectively. We do not enjoy our confidence and you re not satisfied that the scope of relief

available to you under Kansas law on the facts of the case is as limited as our analysis indicates.

Sincerely,

HERSHBERGER, PATTERSON, JONES & ROTH

s/

Robert J. O'Connor

APPENDIX H

EXCERPTS FROM BACKGROUND NOTES PREPARED BY LAURANCE B. WOLFBERG AND GIVEN TO COUNSEL SEPTEMBER 27, 1988 FROM PAGE 6 OF ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 44

* * *

Bruce, I'm afraid that for us to win anything significant, we must bring Greenberg to his knees as he is the culprit. As we see it, this might be accomplished by the trust suit to be cast in such a way as to claim damages, both regular and punitive, and include in the action suitable amounts for the loss of a mother, mental cruelty, character assassination of Carolyn, attempt at alienation of affection, undue influences on active beneficiary (the mother) who is too old to fight and fearful to aid her only daughter if she wants to, and malicious attempt to exhort funds from Carolyn Wolfberg's family in his position as trustee and as self appointed dissolving partner/management for benefit of Alpha to supposedly wind up the partnership affairs on a timely basis. This size business should have been wound up in 1-6 months. He stretched it to 4 years and continues to frustrate Carolyn Wolfberg's family by not releasing gross proceeds of oil company and continuing to threaten company through continued malicious acts, garnishments without notice, impairing the SBF banking relationship. This suit should be $10,000,000 or better in claims as the suffering, loss,

deliberate actions, influence on emotions and loss of family should merit this amount or more.

Sincerely yours,

s/ Larry

Larry Wolfberg

APPENDIX I

SERVICE BUSINESS FORMS, INC.

815 East Second St. • Wichita, Kansas 67202
316-264-4315 • Telex: 437056
WATS 800-835-3191
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316-263-0154

August 30, 1989

Mr. Mark Walker
Crowe & Dunlevy

Dear Mark:

SUBJECT: CIV 86-24410C
Green Wolf Partnership Dissolution.

This will confirm my previous notice to you to appeal the District Court decision on subject case.

I am concerned with your recommendation to the contrary; however, based on business and our overall legal strategy, this effort should be made.

I would appreciate knowing the basis you intend using for this appeal. I have some suggestions that you may wish to include in your brief.

The funds required on our account are being mailed this week in line with your request and our agreement.

Thanks for your attention and assistance.

Sincerely yours,

/s/ Larry W
Larry Wolfberg